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Employment Standards Act, 2000

Employer's Guide to the Application Process: Excess Hours of Work/Averaging Hours

esa

employment standards act

The Employment Standards Act, 2000, known as the ESA, is a law that sets minimum standards for fair workplace practices in Ontario.

If you are protected by the ESA, you have rights at work. Your employer cannot:

- Intimidate you
- Fire you
- Suspend you
- Reduce your pay
- Punish you in any way
- Threaten any of these actions,

because you **ask about** or **ask for** your rights.

Who will help me get my rights?

If you think your employer isn't following the ESA law and you're not getting your rights, contact the Ministry of Labour. Unionized employees should talk to their union representative first.

Ministry staff can help you understand your rights, answer your questions and investigate your complaint. Your employer cannot punish you for talking to the Ministry of Labour about your rights.

After speaking with us, you may decide to file a claim.

3 Steps to filing a claim

- 1) **Contact the Ministry of Labour.** Experienced staff at the ministry can provide information and help you fill out the claim form.
- 2) **Fill out a claim form.** Forms are available at Ministry of Labour offices, Government Information Centres and online at www.gov.on.ca/lab.
- 3) **File the claim form at any Ministry of Labour office.** An investigation of your complaint can't begin until you file the claim form.

Filing a claim is free. Your employer cannot punish you for filing a claim.

The information you need

On the claim form, the Ministry of Labour will ask you for some or all of the following:

A description of your complaint

- what happened
- when it happened (dates, times)
- why it happened
- who was involved
- witness information
- what you're asking for
- how you tried to solve the problem before filing the claim

Information about you and your job

- your Social Insurance Number
- copies of pay stubs or paycheques
- copies of T4 slips
- a copy of your written notice of termination, if applicable
- a copy of your Record of Employment
- a copy of your contract of employment, if you have one
- copies of any warning letters or notices you received
- a record of the hours you worked

Information about your employer

- your employer's full address and telephone numbers
- the name of your employer's bank
- is your employer still operating?
- does your employer operate any other places of business?

NOTE: Even if you do not have all this information, you can still file a claim.

What happens next?

Once your claim is filed, we will try to help you solve the problem directly with your employer. If the issue cannot be settled, an investigation may begin.

The Employment Standards Officer conducts investigations by telephone, through letters, by visiting the workplace and/or by arranging a meeting with you and your employer.

How long does it take?

Claims are investigated as quickly as possible. The time it takes to complete the process varies.

What happens after the investigation?

If the Employment Standards Officer finds that your employer has not violated your rights, the officer will tell you. If you don't agree with the decision, you have 30 days to apply to have it reviewed.

If the Employment Standards Officer finds that your employer broke the law, the officer can order your employer to:

- pay wages that are owed to you
- follow the rules of the ESA
- give back your job
- compensate you.

The officer can also charge your employer with an offence, including a ticket. If convicted, your employer may be fined or sent to jail.

Are there time limits?

Yes. You should file your claim for unpaid wages as soon as possible because generally, you can only recover wages that should have been paid to you in the six months before you filed your claim. You must file all other claims within two years of the violation.

Contact the Ministry of Labour

- Call the Employment Standards Information Centre at:
 - 416-326-7160 (Toronto area)
 - or
 - 1-800-531-5551 (toll-free).
- Call or visit your nearest Ministry of Labour office. You will find the number in the Blue Pages of your local telephone book.
- Visit the Ministry of Labour website at www.gov.on.ca/lab. From there you can find answers to your questions or you can email us.

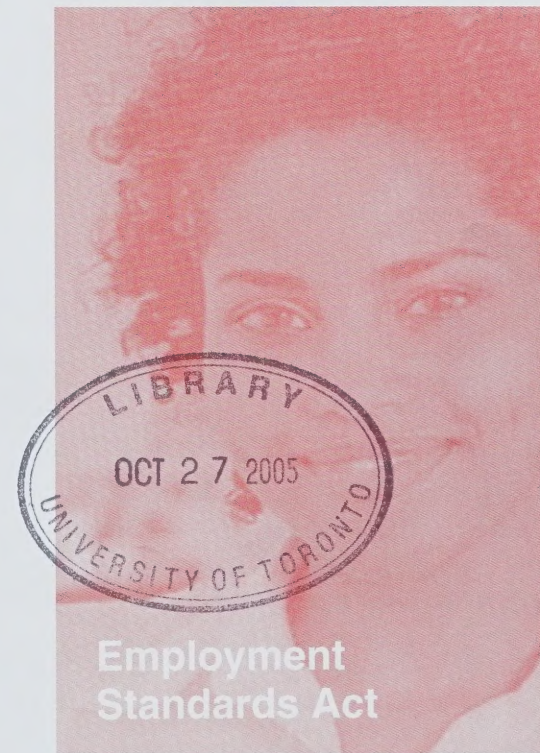
If you do not speak English or French, find someone who can and have them with you when you call or visit the Ministry of Labour



This information is provided as a public service. Although we endeavour to ensure that the information is as current and accurate as possible, errors do occasionally occur. Therefore, we cannot guarantee the accuracy of the information. Readers should, where possible, verify the information before acting on it.

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Claim Your Rights



A step-by-step guide on
How to File a Claim

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Chapter 1-General Information

The intent of this Guide is to provide information to employers who wish their employees to work in excess of the daily and weekly maximums set out in the Employment Standards Act, 2000 (ESA) and/or who wish to average hours of work for the purpose of determining overtime pay entitlements under the ESA. In addition, this Guide is intended to assist employers with the application process for **Approvals for Excess Weekly Hours of Work** and **Approvals for Averaging Hours of Work for Overtime Pay Purposes**.

This publication is provided for your information and convenience only. It is not a legal document. Ontario's laws, including the ESA and its regulations, are available for everyone to read at www.e-laws.gov.on.ca. If there are any differences between this Guide and the ESA and the Regulations, the ESA and the Regulations will govern.

Exemptions and Special Rules

Certain industries and job categories are exempt from the hours of work and overtime rules set out in the ESA. Please refer to the "How Are You Covered by the ESA?" Fact Sheet available at: <http://www.gov.on.ca/LAB/english/es/> for more information on job-specific exemptions and special rules.

Working Excess Hours

Daily/Weekly Hours of Work

For most employees in Ontario, the maximum number of hours they can be required to work is:

- Eight hours a day,
Or
- If the employer has established a regular workday longer than eight hours, then the number of hours in that day,
And
- 48 hours a week.

Agreements to Exceed Daily/Weekly Hours

An employer and an employee can agree in writing that the employee will work more than:

- Eight hours a day
- The employer's established regular work day of more than eight hours, **or**
- 48 hours a week.

However, these agreements are only valid if prior to making the agreement, the employer gives the employee (except unionized employees) the most recent **Information for Employees About Hours of Work and Overtime Pay** document (**Information Sheet**) prepared by the Director of Employment Standards that describes the hours of work and overtime rules in the ESA. The ESA

also requires the written agreements to contain a statement wherein the employee acknowledges receipt of the **Information Sheet** before entering into the agreement. For more information on written agreements to work excess hours and the **Information Sheet** see **Chapter 5-Written Agreements**.

Agreements to exceed the daily and/or weekly hours of work maximums must still comply with the ESA rules about hours free from work and eating periods.

Approval for Excess Weekly Hours of Work

Where an employer and employee agree in writing to work hours in excess of the weekly maximum of 48 hours, the employer must also apply for approval from the Director of Employment Standards. If an employer does not receive either an approval or a refusal within 30 days of serving the application on the Director and has met other conditions, the employees to whom the application applies can begin working excess weekly hours. The maximum hours they can work is the lesser of the number of hours agreed to and 60 hours per work week. For more information on excess hours of work pending approval see **Chapter 4 -Rights and Obligations Pending Approval**.

Note: An employer, who has obtained the written agreement of employees to work excess daily hours and the weekly hours of work do not exceed the maximum of 48 hours, does not require Director approval for employees to work those excess daily hours.

Averaging Hours of Work for Overtime Pay Purposes

Overtime Pay

For most employees, overtime begins after they have worked 44 hours in a work week. After that time, they must receive overtime pay. Overtime pay is at least 1½ times the employee's regular rate of pay (time and a half).

Agreements to Average Hours of Work

An employer and an employee can agree in writing to average the employee's hours of work over a specified period of two or more weeks for the purposes of calculating overtime pay. Under such an agreement, an employee would only qualify for overtime pay if the average hours worked per week during the averaging period exceed 44 hours.

For example, if the agreed period for averaging an employee's hours of work is four weeks, the employee is entitled to overtime only after working 176 hours during the four work weeks (44 hours x 4 weeks = 176 hours). Note that averaging periods cannot overlap one another and must follow one after the other without gaps or breaks.

Where employees are not represented by a union, averaging agreements must contain an expiry date which cannot be more than two years from the date the averaging agreement takes effect.

Where the agreement applies to unionized employees, the employer and union can agree to any expiry date. For more information on agreements to average hours of work, see **Chapter 5-Written Agreements**.

Approval to Average Hours of Work for Overtime Pay Purposes

In addition to having written agreements to average hours of work, the employer must also apply for an approval to average hours of work for overtime pay purposes from the Director of Employment Standards. However, if the employer has not received an approval or a refusal within 30 days of serving the application on the Director, the employer may, having met certain conditions, begin averaging employees' hours over two-week periods. For more information on averaging hours of work pending approval see **Chapter 4-Rights and Obligations Pending Approval**.

Chapter 2-Applying For Approval

To obtain approval from the Director of Employment Standards to permit employees to work excess weekly hours or to average employees' hours of work to determine entitlement to overtime pay, an employer must complete and serve on the Director an application for approval. The Director can be served by hand delivery, verifiable mail, fax and electronically. For further information on service go to **Chapter 3-Serving the Application on the Director**.

This chapter will provide you with the necessary information to select and complete the appropriate application.

The information you provide in the application form must be to the best of your knowledge, complete and accurate. It is an offence, under the Employment Standards Act, 2000 (ESA), to provide false or misleading information.

First, determine the application you wish to complete. If you wish to apply for employees to work hours in excess of 48 in a work week, you will be completing an **Application for Excess Weekly Hours of Work**. If you wish to average employees' hours of work for the purposes of determining entitlement to overtime pay, you will be completing an **Application to Average Hours of Work for Overtime Pay Purposes**.

Application for Excess Weekly Hours of Work

For instructions on completing **Employer Information** go to page 5, and for **Employer Contact Information** go to page 7.

For instruction on completing the **Request for Information: Excess Weekly Hours** go to page 10.

Application to Average Hours of Work

For instructions on completing **Employer Information** go to page 5, and for **Employer Contact Information** go to page 7.

For instructions on completing the **Request for Information: Averaging Hours** go to page 11.

Completing the Application

1. Employer Information

Please review the application carefully and ensure the information provided is complete and accurate. Incomplete or inaccurate information may delay the processing of your application.

Employer Business Name/Trade Name

Provide the full name of the employer's business. If the employer is a sole proprietorship, partnership, or corporation carrying on business under a name registered under the Business Names Act, enter the registered name here.

Legal Name

Provide the employer's legal name.

If the employer is a **sole proprietorship** enter the first and last name of the sole proprietor.

If the employer is a **partnership** carrying on business under the names of the partners, enter the names of all partners by first and last name. For example, if Jane Smith is in partnership with Jane Doe, you would type "Jane Smith and Jane Doe".

If the employer is a **corporation** carrying on business under its corporate name (i.e. name shown on articles of incorporation), enter the corporate name.

Business Type

Indicate the employer's type of business: sole proprietorship, partnership, limited partnership, limited liability partnership or corporation. For example, if the employer is operating the business as a sole proprietor, indicate "sole proprietorship".

Sector Industry Classification (SIC) Description and SIC Code

The Sector Industry Classification System (SIC) is used to classify a business by the type of activity in which it is engaged. SIC industries are identified by a four-digit code.

If you know the SIC code for the employer's business, enter the code under "SIC Code". If you do not know the appropriate code for the employer's business, describe the employer's main type of business activity.

Business Registration Number

If the employer does not have a Business Registration Number, leave the box blank.

If the employer's business has a registration number, enter the nine-digit Business Registration Number.

Corporation Number

If the employer is not a corporation, leave this box blank and go to **Approximate Number of Employees (in Ontario)** below.

If the employer is a corporation, enter the assigned number as indicated here. For example, if a business is incorporated in Ontario it is assigned a number, e.g. "123456 Ontario Limited". Enter the six-digit number only.

Corporation Jurisdiction

If the employer is not a corporation, leave this box blank and go to **Approximate Number of Employees (in Ontario)** below.

If the employer is a corporation, indicate the jurisdiction in which the business is incorporated.

Approximate Number of Employees (in Ontario)

Provide the total number of employees employed by the employer in the province of Ontario.

2. Employer Contact Information

Enter the contact information the Ministry will use to correspond with you regarding this application. One person must be selected as the contact person for the Ministry.

First Name

Provide the first name of the contact person.

Last Name

Provide the last name of the contact person.

Position

Enter title or position of the contact person.

Telephone Number

Enter the area code, telephone number and, if applicable, extension number.

Fax Number

Enter the appropriate fax number to receive any faxes from the Ministry of Labour regarding the application.

E-mail Address

If applicable, enter the e-mail address of the contact person.

Preferred method of receiving correspondence

Indicate the method you wish the Ministry to use to contact you regarding the application: mail, fax, or e-mail. Select one method only. Review the information you provided above for that method. If fax or e-mail is chosen, but the information provided is not valid, the Ministry will correspond by mail.

Preferred language of communication

Indicate your preferred language for communication. Select either English or French.

Employer Address

Enter the address information the Ministry will use to correspond with you regarding this application.

Address Type

Indicate the appropriate employer address type: Head Office, Mailing, Main Business, Home, Legal (i.e. legal representative).

Street Number

Provide the street number.

Suffix (e.g. A)

If applicable, provide the street number suffix.

Street Name

Provide the street name.

Type

Provide the street type: Avenue, Road, etc.

Unit/Suite

If applicable, enter the unit or suite number.

Rural Route

If applicable, provide the rural route number.

P.O. Box

If applicable, provide the post office box number.

Postal Station

If applicable, provide the postal station.

City/Town

Provide the name of the city or town.

Province/State

Provide the name of the province or state.

Country

Provide the name of the country.

Postal Code/Zip Code

Provide the postal code or zip code.

3. Application Type

Select the application type you wish to apply for. If you are applying for an approval for employees to work hours in excess of 48 in a work week, see **Request Information: Excess Weekly Hours of Work** at page 10 for help on selecting the appropriate application type(s).

If you are applying for an approval to average employees' hours of work for the purposes of determining entitlement to overtime pay, see **Request Information: Averaging Hours of Work** at page 11 for help on selecting the appropriate application type(s).

Request Information: Excess Weekly Hours of Work

If you are applying for an **Approval for Excess Weekly Hours of Work**, you must answer the following question:

Does the Employer have, or will the Employer be applying for, an Approval to Average Hours of Work for Overtime Pay Purposes?

If the employer has a current **Approval to Average Hours of Work** or will be applying for an approval to do so, select “Yes”. If the employer does not have an approval and does not intend to apply for one, select “No”.

Whether or not an employer applies for and receives an **Approval for Excess Weekly Hours**, employees are always entitled to daily, in between shifts, and weekly/bi-weekly rest periods in accordance with the ESA. Employees are also, in general, entitled to overtime pay after working 44 hours in a work week at 1½ times each employee’s regular rate of pay.

To complete your application for excess weekly hours, go to **Section 4. Location(s) Where Work Will Be Performed** on page 12.

Request Information: Averaging Hours of Work

If you are applying for an approval to average employees' hours of work, you must also answer the following question:

Does the Employer have, or will the Employer be applying for, an Approval for Excess Weekly Hours of Work?

If the employer has an **Approval for Excess Weekly Hours of Work** or will be applying for an approval to do so, select "Yes". If the employer does not have an approval to do so and does not intend to apply for one, select "No".

To complete your application for **Approval to Average Hours of Work** go to **Section 7. Location(s) Where Work Will Be Performed** at page 18.

4. Location(s) Where Work Will Be Performed

Provide the required information for the location where the excess hours of work, or the averaging of hours of work will apply.

The location will be the workplace where the employee(s) to whom the application applies work(s). This would usually be a workplace of the employer's, but, where the employee works at some location away from the employer's workplace (e.g. the employer of the employee(s) is a temporary help agency), the employer would indicate that location.

Name of Business

Provide the name of the business where the employee(s) to whom the application applies will be performing work.

Street Number

Provide the street number.

Suffix (e.g. A)

If applicable, provide the street number suffix.

Street Name

Provide the street name.

Type

Provide the street type: Avenue, Road, etc.

Unit/Suite

If applicable, enter the unit or suite number.

Rural Route

If applicable, provide the rural route number.

P.O. Box

If applicable, provide the post office box number.

Postal Station

Provide the postal station number.

City/Town

Provide the name of the city or town.

Province

Provide the name of the province.

Postal Code

Provide the postal code.

Approximate number of employees at this location

Provide approximate total number of all the employer's employees working at this location only. Include in this number all employees including those who are not covered by this application.

5. Non-Unionized Employee Information (Excess Weekly Hours Application Only)

This section must be completed by an employer if the employee(s) to whom the application applies are not represented by a union.

Occupational Group

Provide the name of the occupational group of the employee(s) to whom the application applies. For example, if the application will apply to employees employed as mechanics, indicate: mechanics. If the employee to whom the application applies is in a position that does not have an occupational group name, provide the name of the position. For example, if the application will apply to the employer's one and only security guard, provide the name of the position: security guard.

If the application applies to more than one occupational group, after completing the information for the first group as set out below, go to the next available box below the first listed occupational group and complete. Attach additional pages as necessary.

Number of Weekly Hours

Provide the requested maximum number of hours in a work week the employee(s) in the position or named occupational group may work up to. For example, if you are applying for an employee in the named occupational group to work up to a maximum of 50 hours in a work week, indicate: 50.

In calculating the hours of work to be requested for an occupational group, do not include time for which an employee is entitled to take time off work for an eating period. For example, if an employee works a '12-hour shift' four days a week, and the 12-hour shift includes two eating periods of 30 minutes each, the employee actually works 11 hours a day at four days a week for a total of 44 hours in a work week.

Start Date

Provide the requested year/month/day for the excess hours of work to begin. For example, if the employer is applying for an employee to work up to 50 hours a week beginning April 1, 2005, the requested start date is: 2005/04/01.

Please note the Director will not issue an approval with a retroactive start date.

End Date

Provide the requested year/month/day for the excess hours of work to end. For example, if the employer is applying for an employee to work up to 50 hours until June 20, 2005, the requested end date is: 2005/06/20.

Note that an approval for excess hours over 48 in a work week and up to a maximum of 60 will have an expiry date that is no more than three years after the day the approval is issued.

An approval for excess hours over 60 in a work week will have an expiry date that is no more than one year after the day the approval is issued.

Number of Employees

Provide the approximate number of employees to whom the application applies.

Individual Written Agreement

Is/are individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the requested number of hours?

Indicate whether or not the employer has obtained the written agreement of the employees to work the requested number of weekly hours. An application, if approved, will only apply to employees if they receive the **Information Sheet** as required by the ESA, agree in writing to work the excess weekly hours, and are members of the named occupational group.

For further information on written agreements and the requirement to provide the Ministry's **Information Sheet** to employees, see **Chapter 5-Written Agreements**.

6. Unionized Employee Information (Excess Weekly Hours Application Only)

This section must be completed by an employer if the employee(s) to whom the application applies is or are represented by a union.

Occupational Group

Provide the name of the occupational group to which the employee(s) belong(s). For example, if the application applies to employees employed as mechanics, indicate: mechanics. If the employee to whom the application applies is in a position that does not have an occupational group name, provide the name of the position. For example, if the application will apply to the employer's one and only security guard, provide the name of the position: security guard.

If the application applies to more than one occupational group, after completing the information for the first group as set out below, go to the next available box below the first listed occupational group and complete. Attach additional pages as necessary.

Number of Weekly Hours

Provide the requested maximum number of hours in a work week the employee(s) in the position or named occupational group will work up to. For example, if you are applying for an employee in the named occupational group to work up to a maximum of 50 hours in a work week, indicate: 50.

In calculating the hours of work to be requested for an occupational group, do not include time for which an employee is entitled to take time off work for an eating period. For example, if an employee works a '12-hour shift' four days a week, and the 12-hour shift includes two eating periods of 30 minutes each, the employee actually works 11 hours a day at four days a week for a total of 44 hours in a work week.

Start Date

Provide the requested year/month/day for the excess hours of work to begin. For example, if the employer is applying for an employee to work up to 50 hours beginning April 10, 2005, the requested start date is: 2005/04/10.

Please note the Director will not issue an approval with a retroactive start date.

End Date

Provide the requested year/month/day for the excess hours of work to end. For example, if the employer is applying for an employee to work up to 50 hours until June 20, 2005, the requested end date is: 2005/06/20.

Number of Employees

Provide the approximate number of employees to whom the application applies.

Written Agreement

Is/are written agreement(s) in place, in accordance with the ESA, with the union that allow(s) for employees to work the requested number of hours?

Indicate whether or not the employer has obtained the union's written agreement for employees to work the requested number of weekly hours for the named position(s) or occupational group(s). An **Approval for Excess Weekly Hours** will only apply to employees if their union has agreed in writing that employees will work the excess weekly hours and the employees are members of the named occupational group(s). Employers are not required to provide the **Information Sheet** prepared by the Ministry to unionized employees.

For further information on written agreements refer to **Chapter 5-Written Agreements**.

Go to **Section 10. Reason(s) for Excess Weekly Hours Application** at page 24.

7. Location(s) Where Work Will Be Performed (Averaging Application Only)

Provide the required information for the location where the excess hours of work, or the averaging of hours of work will apply.

The location will be the workplace where the employee(s) to whom the application applies work(s). This would usually be a workplace of the employer's, but, where the employee works at some location away from the employer's workplace (e.g. the employer of the employee(s) is a temporary help agency), the employer would indicate that location.

Name of Business

Provide the name of the business where the employee(s) to whom the application applies will be performing work.

Street Number

Provide the street number.

Suffix (e.g. A)

If applicable, provide the street number suffix.

Street Name

Provide the street name.

Type

Provide the street type: Avenue, Road, etc.

Unit/Suite

If applicable, enter the unit or suite number.

Rural Route

If applicable, provide the rural route number.

P.O. Box

If applicable, provide the post office box number.

Hours of Work and Averaging Hours

General Information

Submit this form to: The Director, Employment Standards
 400 University Avenue, 9th Floor
 Toronto, Ontario, M7A 1T7
 Fax: 1-866-588-9998 or
 416-212-7900

Incomplete or inaccurate information may delay the processing of your application. If the application is faxed after 5:00 p.m. or on a day on which the Director's office is closed, the service of the application shall be deemed to be effected on the next day on which the Director's office is not closed.

In the event that this application is approved, the employer must still comply with the daily and weekly rest periods (section 18), eating periods (section 20) and overtime pay (section 22) provisions in the Employment Standards Act, 2000 (ESA).

This information is collected under the authority of the ESA to assist in the processing of applications for excess hours and overtime averaging. The collection, use and disclosure of this information is regulated under the Freedom of Information and Protection of Privacy Act, R. S. O. 1990, c. F.31 as amended. If you have any questions about this matter, you may contact the Ministry of Labour at (416) 326-7160 in the Greater Toronto Area, or 1-800-531-5551 if calling outside the GTA.

ID (Ministry Use)

1. Employer Information

Employer Business/Trade Name

Legal Name

Sector Industry Classification (SIC) Description. Describe employer's main type of business activity.

SIC Code

Business Type (e.g. Corporation, Limited Partnership, Partnership, Sole Proprietorship, Limited Liability Partnership)

Business Registration Number

Corporation Number, if applicable

Corporation Jurisdiction, if applicable (e.g. Ontario, Canada, other)

Approximate Number of Employees (in Ontario)

2. Employer Contact Information

First Name

Last Name

Position

Telephone (include area code) Extension

Fax Number (include area code)

E-mail Address

Preferred method of receiving correspondence.

☐ Mail

☐ Fax

☐ E-mail

Preferred language of communication

☐ English

☐ French

Employer Address

Please indicate the address type. This address will be used for contact purposes.

☐ Head Office

☐ Mailing

☐ Main Business

☐ Home

☐ Legal

Street Number

Suffix (eg. A)

Street Name

Type

Direction

Unit/Suite

Rural Route

PO Box

Postal Station

City/Town

Province/State

Country

Postal Code/Zip Code

3. Application Type. Please select the following application types.

☐

Excess Weekly Hours of Work.

☐

Averaging Hours of Work for Overtime Pay Purposes.

Does the Employer have or will the Employer be applying for an Approval to Average Hours of work for Overtime Pay Purposes?

☐ Yes

☐ No

Does the Employer have or will the Employer be applying for an Approval for Excess Weekly Hours of Work?

☐ Yes

☐ No

Complete pages 2 and 4.

Complete pages 3 and 4.

4. Locations Where Work Will Be Performed (Excess Weekly Hours Application only)

Please enter the required information for the location where the excess weekly hours of work will apply. Sections 4, 5 and/or 6 must be filled out for each location where work will be performed by the employees this application applies to. Attach additional pages as necessary.

Name of Business

Street Number	Suffix (eg. A)	Street Name	Type	Direction	Unit/Suite
Rural Route	PO Box	Postal Station	City/Town		
Province		Postal Code	Approximate number of employees at this location		

5. Non-Unionized Employee Information (Excess Weekly Hours Application only)

Please fill information for Non-Unionized Employees at this location. Attach additional pages as necessary.

Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No
Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No
Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No

6. Unionized Employee Information (Excess Weekly Hours Application only)

Please fill information for Unionized Employees at this location. Attach additional pages as necessary.

Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No
	Union Local	Union Contact Name			Telephone Number
Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No
	Union Local	Union Contact Name			Telephone Number
Occupational Group	Requested Number of Weekly Hours	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for employee(s) to work the requested number of hours? <input type="checkbox"/> Yes <input type="checkbox"/> No
	Union Local	Union Contact Name			Telephone Number

7. Locations Where Work Will Be Performed (Averaging Application only)

Please enter the required information for the location where the averaging hours of work will apply. Sections 7, 8 and/or 9 must be filled out for each location where work will be performed by the employees this application applies to. Attach additional pages as necessary.

Name of Business

Street Number	Suffix (eg. A)	Street Name	Type	Direction	Unit/Suite
Rural Route	PO Box	Postal Station	City/Town		
Province			Postal Code	Approximate number of employees at this location	

8. Non-Unionized Employee Information (Averaging Application only)

Please fill information for Non-Unionized Employees at this location. Attach additional pages as necessary.

Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the averaging of hours as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No
Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the averaging of hours as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No
Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Individual written agreement(s) in place, in accordance with the ESA, that allow(s) for employee(s) to work the averaging of hours as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No

9. Unionized Employee Information (Averaging Application only)

Please fill information for Unionized Employees at this location. Attach additional pages as necessary.

Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for the averaging of hours of work as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No
Union Local		Union Contact Name			Telephone Number
Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for the averaging of hours of work as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No
Union Local		Union Contact Name			Telephone Number
Occupational Group	Requested Number of Weeks to Average Over	Start Date Y Y Y Y M M D D	End Date Y Y Y Y M M D D	Number of Employees	Written agreement(s) in place, in accordance with the ESA, with the Union that allow(s) for the averaging of hours of work as requested? <input type="checkbox"/> Yes <input type="checkbox"/> No
Union Local		Union Contact Name			Telephone Number

10. Reason(s) for Excess Weekly Hours Application (max 250 characters).

11. Reason(s) for Averaging Application (max 250 characters).

12. In the last three years ...

Has the Employer been convicted of an offence under the Occupational Health and Safety Act? If yes, please indicate the most recent conviction date.

☐ Yes

☐ No

Date

Y	Y	Y	Y	M	M	U	U
---	---	---	---	---	---	---	---

Has the Employer been convicted of an offence under the ESA? If yes, please indicate the most recent conviction date.

☐ Yes

☐ No

Date

Y	Y	Y	Y	M	M	U	U
---	---	---	---	---	---	---	---

Does the Employer have any unpaid monetary orders under the ESA for which the time to apply for a review has expired? If yes, please indicate the most recent monetary order date.

☐ Yes

☐ No

Date

Y	Y	Y	Y	M	M	U	U
---	---	---	---	---	---	---	---

13. Declaration

Please note that it is an offence to provide false or misleading information under the ESA. I, the undersigned declare that, to the best of my knowledge, this information and any additional information submitted in support of the employer's application is complete and accurate.

Name (Please print)

Signature

Date

Y	Y	Y	Y	M	M	U	U
---	---	---	---	---	---	---	---

Postal Station

Provide the postal station number.

City/Town

Provide the name of the city or town.

Province

Provide the name of the province.

Postal Code

Provide the postal code.

Approximate number of employees at this location

Provide approximate total number of all the employer's employees working at this location only. Include in this number all employees including those who are not covered by this application.

8. Non-Unionized Employee Information (Averaging Application Only)

This section must be completed by an employer if the employees to whom the application applies are not represented by a union.

Occupational Group

Provide the name of the occupational group of the employees to whom the application applies. For example, if the application will apply to employees employed as mechanics, indicate: mechanics. If an employee to whom the application applies is in a position that does not have an occupational group name, provide the name of the position. For example, if the application applies to the employer's one and only security guard, provide the name of the position: security guard.

If the application applies to more than one occupational group, after completing the information for the first group as set out below go to the next available box below the first listed occupational group and complete. Attach additional pages as necessary.

Number of Weeks to Average Over

Provide the requested maximum number of weeks over which hours of work will be averaged for the purpose of determining employees' entitlements to overtime pay. The averaging period must consist of separate, non-overlapping, contiguous periods of two or more consecutive weeks. For example, if you are applying to average the hours of work of an employee in the named occupational group over a period of four weeks, indicate: 4.

Start Date

Provide the requested year/month/day for the averaging of overtime hours to begin. For example, if the employer is applying to average an employee's hours of work over a two-week period beginning April 10, 2005, the requested start date is: 2005/04/10.

Please note the Director will not issue an approval with a retroactive start date.

End Date

Provide the requested year/month/day for the approval to end. For example, if the employer is applying to average an employee's hours of work until June 10, 2005, the requested end date is: 2005/06/10.

Number of Employees

Provide the approximate number of employees to whom the application applies.

Individual Written Agreement

Is/are individual written agreement(s) in place, in accordance with the ESA, that allow(s) for the averaging of hours of work as requested?

Indicate whether or not the employer has obtained the written agreement of its employees to average hours of work. An approval will only apply to employees who agree in writing to have their hours of work averaged over a specified period and who are members of the position(s) or occupational group(s) listed in the approval.

An approval applies to the employees, or the occupational group(s) that include(s) the employees, specified in the approval. The employees or occupational group(s) can include employees who are not employed by the employer at the time the approval was issued or employees who had not entered into a written agreement with the employer at the time the application was served. As noted above, an approval will only apply to an employee of the occupational group specified if the employee has agreed in writing to average hours of work.

For example, an employer applies for all employees employed as mechanics to have their hours of work averaged over a two-week period. The employer has the written agreement of four of its five mechanics to average their hours. The Director issues an approval that indicates “mechanics” may have their hours of work averaged over a two-week period. The employer then hires two additional mechanics. If the employer receives written agreement from those two new employees to have their hours of work averaged over two weeks, the approval will permit the employer to average the new employees’ hours of work over a two-week period. The employer will not be able to average the hours of work of an employee who does not sign a written agreement.

An agreement to average hours of work with an employee, who is not unionized, must expire within two years of the date the agreement takes effect. For further information on written agreements refer to **Chapter 5-Written Agreements**.

9. Unionized Employee Information (Averaging Application Only)

This section must be completed by an employer if the employee(s) to whom the application applies is or are represented by a union.

Occupational Group

Provide the name of the occupational group of the employee(s) to whom the application applies. For example, if the application will apply to employees employed as mechanics, indicate: mechanics. If the employee to whom the application applies is in a position that does not have an occupational group name, provide the name of the position. For example, if the application will apply to the employer's one and only security guard, provide the name of the position: security guard.

If the application applies to more than one occupational group, after completing the information for the first group as set out below go to the next available box below the first listed occupational group and complete. Attach additional pages as necessary.

Number of Weeks to Average Over

Provide the requested maximum number of weeks over which an employee's hours of work will be averaged for the purpose of determining the employee's entitlement to overtime pay. The averaging period must consist of separate, non-overlapping, contiguous periods of two or more consecutive weeks. For example, if you are applying to average the hours of work of an employee in the named occupational group over a period of four weeks, indicate: 4.

Start Date

Provide the requested year/month/day for the averaging of overtime hours to begin. For example, if the employer is applying to average an employee's hours of work over a 2-week period beginning April 11, 2005, the requested start date is: 2005/04/11.

Please note the Director will not issue an approval with a retroactive start date.

End Date

Provide the requested year/month/day for the averaging of overtime hours to end. For example, if the employer is applying to average an employee's hours of work until June 12, 2005, the requested end date is: 2005/06/12.

The ESA does not place an upper limit on either the length of an **Approval to Average Hours** or on an agreement with a union to average hours of work (although an averaging agreement must contain an expiry date)

Number of Employees

Provide the approximate number of employees to whom the application applies.

Written Agreement

Is/are written agreement(s) in place, in accordance with the ESA with the union that allow(s) for the averaging of hours of work as requested?

Indicate whether or not the employer has obtained the written agreement of the union that represents the employees to whom the application applies. An application, if approved, will only apply to unionized employees if their union has agreed in writing to have employees' hours of work averaged over a specified period and the employees are members of the named occupational group.

An approval applies to the employees, or the occupational group(s) that include(s) the employees, specified in the approval. The employees or occupational group can include employees who are not employed by the employer at the time the approval was issued. For example, the employer and union enter into an agreement for employees in occupational group A to average their hours of work over a two-week period. The approval issued by the Director specifies an averaging period of two weeks for occupational group A. If the employer subsequently hires two additional employees to work in occupational group A, the approval will permit the employer to average their hours of work over a two-week period.

For further information on written agreements see **Chapter 5-Written Agreements**.

Go to **Section 11. Reason(s) for Averaging Application** at page 25.

10. Reason(s) for Excess Weekly Hours Application

Summarize the reason(s) for applying for excess weekly hours of work for the named occupational group(s).

The Director of Employment Standards may consider any relevant factor in deciding whether to issue an approval. However, the ESA specifically lists two factors that may be taken into consideration:

- Current or past contraventions of the ESA or its regulations on the part of the employer, and
- The health and safety of employees.

The Director may consider other factors including.

- Whether the employer has examined other avenues to get the work done
- The number of excess hours being requested
- The requested duration of the approval and what necessary measures are being adopted to avoid or reduce excess weekly hours in the future
- The implications for the employer and/or employees if approval is not granted
- Whether the employer has also served an application for an **Approval To Average Hours of Work**.

11. Reason(s) for Averaging Application

Provide the reason(s) for applying to average hours of work for the named occupational group(s).

The Director of Employment Standards may consider any relevant factor in deciding whether to issue an approval. However, the ESA specifically lists two factors that may be taken into consideration:

- Current or past contraventions of the ESA or its regulations on the part of the employer, and
- The health and safety of employees.

The Director may also consider other factors including:

- Whether the information provided on scheduling indicates non-compliance with the hours of work or rest period provisions, and
- Whether the employer has also served an application for an **Approval for Excess Weekly Hours of Work**.

12. In the last three years...

Has the Employer been convicted of an offence under the Occupational Health and Safety Act (OHSA)?

If the employer has been convicted of an offence under the OHSA in the three-year period preceding the date of application, select "Yes" on the form. The employer must then provide the year/month/day of the most recent conviction. For instance, if the employer applies for an approval on March 23, 2005 and the employer was convicted under the OHSA between March 23, 2002 (date of the application less three years) and March 23, 2005, the employer would indicate "Yes". The employer would then provide the date of the conviction.

Only convictions under the OHSA must be indicated. For instance, if an employer was charged with a violation under the OHSA but was never convicted of a violation within the three-year period preceding the date of the application, the response would be "No" and the date would be left blank.

Has the Employer been convicted of an offence under the Employment Standards Act, 2000 (ESA)?

If the employer has been convicted of an offence under the ESA in the three-year period preceding the date of application, select "Yes", then provide the year/month/day of the most recent conviction in the space provided. For instance, if the employer applies for an approval on March 23, 2005 and the employer was convicted under the ESA between March 23, 2002 and March 23, 2005, the employer would indicate on the form "Yes". The employer would then provide the date of the conviction.

Only convictions under the ESA must be indicated. For instance, if an employer applying for approval was in the previous month issued a ticket under the Provincial Offences Act for failure to comply with the ESA and the employer did not challenge the ticket within the time period allowed, the employer would select "Yes" and provide the date of the ticket. If the employer successfully challenged the ticket and had no other prior convictions in the three years preceding the application, the employer would select "No" and leave the date blank.

Does the employer have any outstanding monetary orders under the ESA for which the time to apply for a review has expired?

If an Employment Standards Officer issued an Order to Pay or other monetary order against the employer within three years preceding the date of the application and the 30-day period to apply for review of the Order has passed and the Order has not been paid, select "Yes". If the employer paid the Order in full or the employer has applied for review of the Order and the Ontario Labour Relations Board has not yet issued a decision respecting the review or has issued a decision setting the Order aside, select "No."

13. Declaration

Please note that it is an offence to provide false or misleading information under the ESA. I, the undersigned declare that, to the best of my knowledge, this information contained herein and any additional information submitted in support of this application is complete and accurate.

If you are in agreement with the Declaration, complete the following:

Name (please print)

Print your first and last name.

Signature

Sign your name.

Date

Provide the year/month/day on which the application was completed.

Chapter 3-Serving the Application on the Director

The Employment Standards Act, 2000 (ESA) requires employers to **serve** the application for an **Approval for Excess Weekly Hours** or to **Average Hours of Work** on the Director of Employment Standards. This requirement is in part due to ESA provisions that permit employees to work hours in excess of 48 up to a maximum of 60 in a work week or to have their hours of work averaged over a two-week period, in certain circumstances, 30 days following service of the application (“30-day period”) even though approval has not yet been received. For further information on the 30-day period and rules that apply pending receipt of an approval, see **Chapter 4-Rights and Obligations Pending Approval**.

The service requirement is also necessary for compliance with the posting requirement for applications for excess weekly hours of work. For further information on the posting requirement for applications for excess weekly hours of work see **Chapter 4-Rights and Obligations Pending Approval**.

The address of the Director’s office is set out below. **Do not deliver an application to any other location.** Failure to serve the application on the Director will mean the application is not served in accordance with the ESA. The 30-day period will not start until the application is served on the Director.

Prior to serving the application, make a copy or copies for your records. Note: If you are serving an application for an **Approval for Excess Weekly Hours**, you will need at least one copy in order to comply with the posting requirement. For further information on the 30-day period and the posting requirement see **Chapter 4-Rights and Obligations Pending Approval**.

The application can be served on the Director by:

- 1) Completing the application available on the Ministry’s website www.gov.on.ca/LAB/english/ and submitting it electronically to the Director’s office according to the instructions provided. Date of service will be on the date transmission is made. *Retain a copy of the electronic submission for your records.
- 2) Mailing the application to the Director’s office by **verifiable** mail. Three Canada Post services fall within the meaning of verifiable mail:
 - a. Registered Mail
 - b. Xpresspost only if the “signature upon delivery” option is selected
 - c. Priority Courier only if the “signature upon delivery” option is selected.

Date of service will be the date shown on the verification receipt. Retain the receipt for your records.

The address of the Director’s office is:
Director of Employment Standards
400 University Avenue, 9th Floor
Toronto, ON M7A 1T7

- 3) Faxing the Application to the Director's office at (416) 212-7900 or toll free at 1-866-588-9998. Date of service will be the date on which the transmission is made.* Retain confirmation of successful transmission of the application for your records.
- 4) Delivering the application in person to the Director's office. Date of service will be the date shown on the receipt of acknowledgement provided by the Director or his/her representative. Retain the receipt for your records.

*An application that is served by a means described in clause 1 or 3 above on a day on which the Director's office is closed or on any other day after 5 p.m. shall be deemed to have been served on the next day that the Director's office is not closed.

Chapter 4-Rights and Obligations Pending Approval

Application for Excess Weekly Hours of Work

Posting the Application

On the **date of service** of an application for excess weekly hours, the employer must post at least one copy of the application in every workplace where the employees to whom the application applies works. The application must be posted in an area in the workplace where it will be clearly visible to the employees and will likely come to their attention.

If the application is not served in accordance with the ESA (see **Chapter 3-Serving the Application on the Director** for methods of service), the employer must not post the application until such time as service is effected.

The application must remain posted from the date of service until the Director of Employment Standards issues an **Approval** or gives the employer a **Notice of Refusal** of the application.

Thirty Days Following Service of the Application

Generally, the ESA requires the employer to have an **Approval for Excess Weekly Hours** prior to employees working hours in excess of 48 in a week. However, the ESA does provide a limited exception to this requirement pending receipt of the **Approval for Excess Weekly Hours** or the **Notice of Refusal** from the Director of Employment Standards.

If the employer satisfies **all** of the nine conditions set out below, employees will be permitted to work more than 48 hours in a work week up to a maximum of 60 hours pending the Ministry's processing of the application. Note that this limit applies even if the agreements with the employees to whom the application applies are for hours in excess of 60 hours per work week.

The nine conditions are:

1. The employee has entered into a written agreement with the employer to work excess weekly hours (for further information see **Chapter 5-Written Agreements**.)
2. The employer served the application for excess weekly hours on the Director of Employment Standards in accordance with the ESA (for further information see **Chapter 3-Serving the Application on the Director**.)
3. The application served on the Director applies to the individual employee or the occupational group, which includes the individual employee who would work the excess weekly hours.
4. 30 calendar days have passed since the employer served the Director with the **Application for Excess Weekly Hours**.

5. The employer has not received a notice from the Director that the **Application for Excess Weekly Hours** has been refused.
6. The employer's most recent previous application, if any, for excess weekly hours of work was not refused.
7. The employer's most recent **Approval for Excess Weekly Hours**, if any, was not revoked.
8. The employer has posted and kept posted a copy of the **Application for Excess Weekly Hours**. The application is posted in the workplace in at least one location where it is clearly visible to the employees to which the application applies and is likely to come to their attention.
9. The employee does not work more than the least of any of the following amounts:
 - The number of hours specified in the application for the employee, or the occupational group which includes the employee
 - The number of hours the employee agreed to in writing
 - 60 hours.

This means the most an employee can work pending receipt of an **Approval** or **Notice of Refusal** is 60 hours in a work week. However, if the employee has agreed in writing to work, for example, up to 55 hours in a work week, then the maximum number of hours that employee can work pending receipt of the **Approval** or **Notice of Refusal**, is 55 hours. If the employer has applied for an employee to work up to 65 hours in a work week, and the employee has agreed in writing to do so, the maximum the employee can work is 60 hours pending receipt of the **Approval** or **Notice of Refusal**.

Applications Served Before March 1, 2005

To provide a smooth transition from the "old" rules to the "new" rules, employers may serve applications for excess weekly hours on the Director of Employment Standards before March 1, 2005, the date the Employment Standards Amendment Act (Hours of Work and Other Matters), 2004 (Bill 63) comes into force.

Where an **Application for Excess Weekly Hours of Work** is served before March 1, 2005, the 30-day period is deemed to end on *the later of*:

- The last day of the 30-day period, and
- March 1, 2005.

This means the earliest any employer can rely on the 30-day period is March 1, 2005.

Application To Average Hours of Work

Thirty Days Following Service of the Application

Generally, the ESA requires the employer to have an **Approval to Average Hours of Work** before averaging employees' hours of work over a specified period. However, the ESA does provide a limited exception to this requirement pending receipt of an **Approval** or **Notice of Refusal**.

If the employer satisfies **all** of the eight conditions set out in the ESA, it will be permitted to average employees' hours of work over a two-week period pending the Ministry's processing of the application.

The eight conditions are:

1. The employee has entered into a written agreement with the employer to average hours of work over a specified number of weeks (for further information see **Chapter 5-Written Agreements**.)
2. The employer has **served** the application for **Approval to Average Hours of Work** on the Director in accordance with the ESA (for further information see **Chapter 3-Serving the Application on the Director**.)
3. The application applies to the employee, or the occupational group, which includes the employee, whose hours of work will be averaged.
4. 30 calendar days have passed since the employer served the Director of Employment Standards with the **Application to Average Hours of Work**.
5. The employer has not received a notice from the Director that the **Application to Average Hours of Work** has been refused.
6. The employer's most recent previous application, if any, for **Approval to Average Hours of Work**, was not refused.
7. The employer's most recent **Approval to Average Hours of Work**, if any, was not revoked.
8. The employee's hours of work, pending approval, are averaged over separate, non-overlapping, contiguous periods of two consecutive weeks.

This condition limits the number of weeks over which employees' hours of work can be averaged to a two-week period pending approval. For example, an employer applies on March 30, 2005 for an **Approval to Average Hours of Work** over a period of four weeks. The employees have entered into written agreements to have their hours of work averaged over four weeks. If the employer meets the conditions above, the employer may, pending receipt of an **Approval** or **Notice of Refusal**, average employees' hours of work, but only over a two-week period.

The employer cannot average hours of work over a four-week period until an **Approval** from the Director of Employment Standards is received.

Applications Served Before March 1, 2005

To provide a smooth transition from the “old” rules to the “new” rules, employers may serve applications to average hours of work on the Director before March 1, 2005, the date the Employment Standards Amendment Act (Hours of Work and Other Matters), 2004 (Bill 63) comes into force.

Where an **Application to Average Hours of Work** is served before March 1, 2005, the 30-day period is deemed to end on *the later of*:

- The last day of the 30-day period, and
- March 1, 2005.

This means the earliest any employer can rely on the 30-day period to average hours of work over a two-week period is March 1, 2005.

Chapter 5-Written Agreements

Agreements to Work Excess Hours

The ESA requires agreements to work excess hours to be in writing. Written agreements in electronic form may constitute valid agreements under the ESA, however, there must be evidence to show that the electronic text actually does reflect the employee's agreement.

In the case of agreements made on or after March 1, 2005, employers must also provide employees with a copy of the most recent **Information for Employees About Hours of Work and Overtime Pay (Information Sheet)** before the employee enters into the written agreement. The ESA requires that the agreement itself contain a statement in which the employee acknowledges that he or she received the most recent copy of the **Information Sheet**.

For further information on drafting agreements to work excess hours see page 35.

Transition of Existing (Old) Agreements to Work Excess Hours

Existing agreements to work excess daily hours

Agreements to exceed the limit on hours of work in a day set out in clause (1)(a) of s.17 of the ESA as it reads on February 28, 2005 are treated as if they are excess daily hours agreements under s.17 (2) of the Act as it reads on March 1, 2005.

Existing agreements to work excess weekly hours up to 60

Agreements to exceed the limit on hours of work in a week set out in clause (1)(b) of s.17 of the ESA as it reads on February 28, 2005 are treated as if they are excess weekly hours agreements under s.17 (3)(a) of the Act as it reads on March 1, 2005.

Existing agreements to work excess weekly hours over 60

Agreements to exceed the limit on hours of work set out in clause (2)(b) of s.17 as it reads on February 28, 2005 (i.e. agreements to work hours in excess of 60 in a work week), are treated as if they are excess weekly hours agreements under s.17 (3)(a) of the Act as it reads on March 1, 2005.

While the agreements referred to above ("old" agreements) are treated as if they are agreements made under s.17 as it reads on March 1, 2005

("new" agreements), there are special rules regarding the provision of **Information Sheets** to employees with respect to these old agreements.

Otherwise, "old" agreements and "new" agreements for excess hours are treated the same. In particular, employers who have "old" agreements with employees must apply for approval from

the Director of Employment Standards in order for employees to work more than 48 hours per work week after February 28, 2005.

Information Sheet Requirement for Existing (Old) Agreements to Work Excess Hours

“Old” existing agreements are agreements made under the provisions of the ESA before the Act was amended by the Employment Standards Amendment Act (Hours of Work and Other Matters), 2004, which comes into force March 1, 2005.

Under the provisions in force immediately before March 1, 2005, there was no requirement that the employer provide employees with the Ministry’s **Information Sheet** before entering into agreements with those employees to work excess daily and/or weekly hours.

As a result, the requirement that employers must provide employees with a copy of the most recent **Information Sheet** before the employee enters into the written agreement for excess hours does not apply to existing agreements. The ESA instead requires employers who have existing written agreements with employees to work excess hours to provide the employees with a copy of the **Information Sheet** by June 1, 2005.

Unionized Employees and Agreements to Work Excess Hours

An employer is not required to provide employees represented by a union or the union with an **Information Sheet** before or after entering into an agreement to work excess hours.

Requirements for Agreements to Work Excess Hours

In order for an employee's agreement to work excess hours to be valid, the employee's consent must be informed and voluntary. The terms of an agreement must also state clearly and explicitly what is being agreed upon by the parties to the agreement. Section 17 of the ESA also places specific requirements on agreements to work excess hours. Here is a list of points to consider when drafting agreements to work excess hours under s.17 of the ESA.

1. The agreement must be in writing.

An agreement to work excess hours must be in writing. Written agreements in electronic form may constitute valid agreements under the ESA; however, there must be some evidence to show that the electronic text actually does reflect the employee's agreement. Simply not responding to an e-mail from an employer that says, for example, "If you don't respond, you will be considered to have agreed..." does not constitute a valid agreement for the purposes of the ESA.

2. The agreement must specify the maximum number of excess hours in a day or in a week that the employee will agree to work.

It is not sufficient for an agreement to note, "The employee agrees to work in excess of the daily limit". The agreement must specify the number of hours an employee will work up to in excess of the daily or weekly limit. The daily limit is eight hours in a day, or if the employer has established a work day longer than eight hours, then the daily limit is the number of hours in that day, and 48 hours in a work week.

Agreements to work excess daily hours and agreements to work excess weekly hours are two separate agreements under the ESA but they can be incorporated into one document.

Avoid use of the word "overtime" when drafting agreements to work excess hours, because "overtime" is not the same as excess hours. Since the general overtime threshold (44 hours per week) is different from the general hours of work limits (eight hours a day, or a longer regular day established by the employer, and 48 hours in a week), an employee could agree to work "overtime", i.e. hours in excess of 44 in a week, without necessarily having agreed to work more than 48 hours in a week or more than eight hours in a day, or a longer regular day established by the employer.

3. The employer may wish to refer explicitly to the specific daily and weekly limits in the agreement to assist in demonstrating informed consent.

An employee's consent to work excess hours must be informed. An employee must be aware that he or she is giving up the right to have his or her daily and weekly hours of work limited as set out in the ESA.

4. **The agreement must contain a statement in which the employee acknowledges he or she received a document that the employer represented as the most recent Ministry of Labour Information Sheet.***

For agreements to be valid, employers must provide employees with a copy of the most recent **Information Sheet** before the employee enters into the agreement. * The Act requires that the agreement itself contain a statement in which the employee acknowledges that he or she received the most recent version of the **Information Sheet**.

*The requirement to provide the **Information Sheet** to employees before entering into the agreement and to have the agreement contain a statement acknowledging receipt, does not apply to unionized employees or excess hours agreements entered into under the ESA provisions in force immediately before March 1, 2005.

5. **Ideally, the agreement would inform an employee of his or her entitlement to cancel the agreement on two week's written notice to the employer.**

Generally, employees can revoke an agreement to work excess daily hours and any agreement to work excess weekly hours by providing their employer with two week's notice in writing. Employers are entitled to revoke an agreement by providing employees with reasonable notice.

6. **Ideally, the agreement would indicate any additional terms or conditions negotiated by the employer and employee relevant to working excess hours.**

In exchange for working excess hours, an employer and employee may negotiate other terms. Some parties agree to abide by a particular work schedule. Some employees may ask to receive, for example, four hour's advance notice of requests to work additional hours. Employers may agree to schedule excess hours only for those who volunteer to work additional hours at the beginning of the week. Ideally, terms such as these would be included in the agreement so that the employer and employee can easily determine what it is they are agreeing to.

7. **Ideally, the agreement would state when it will come into effect and when it will end.**
8. **The agreement must include the names of the parties to the agreement (i.e. the employer's name and the employee's name).**
9. **There must be some clear indication that the employer and employee have in fact agreed.**

Typically the agreement of the employee and employer is indicated by having both parties sign the agreement.

Other items to keep in mind:

- Employees must have had a sufficient amount of time to consider the agreement before agreeing to enter into it. What is sufficient will vary depending on the circumstances and the type of agreement.
- The agreement should be sufficiently specific so that an independent, objective third party would be able to determine what was being agreed to simply by reading the agreement.
- A union may enter into agreements to work excess daily and/or weekly hours on behalf of the employees they represent.

Agreements to Average Hours of Work for Overtime Pay Purposes

The ESA requires agreements to average hours of work for the purposes of determining entitlement to overtime pay to be in writing. Written agreements in electronic form may constitute valid agreements under the ESA, however, there must be evidence to show that the electronic text actually does reflect the employee's agreement.

For an overtime averaging agreement to be valid, the ESA requires that the agreement contain an expiry date. If the agreement involves an employee who is not represented by a union, the expiry date of the agreement cannot be more than two years after the day the agreement takes effect.

Transition of Existing (Old) Agreements to Average Hours of Work

Agreements to average hours of work that were entered into before March 1, 2005 (including agreements that were entered into under the former Employment Standards Act) that have not been revoked ("old" agreements) are treated as if they are agreements made under the current ESA ("new" agreements).

However, employers who have "old" or existing agreements with employees must apply for approval from the Director in order for the employer to average employees' hours of work after February 28, 2005. This is so even if the Director had approved the agreement pursuant to s. 30 of Reg. 285/01. The ESA specifically provides that any approval granted by the Director in these circumstances ceases to have effect on March 1, 2005.

Requirements for Agreements to Average Hours of Work for Overtime Pay Purposes

In order for an employee's agreement to have his or her hours of work averaged for overtime pay purposes to be valid, the employee's consent must be informed and voluntary. The terms of an agreement must also state clearly and explicitly what is being agreed upon. In addition, s. 22 of the ESA places specific requirements on agreements to average hours of work for the purposes of determining entitlement to overtime pay. Here is a list of points to consider when drafting agreements to average hours of work.

1. The agreement must be in writing.

An agreement to average hours of work for overtime pay purposes must be in writing. Written agreements in electronic form may constitute valid agreements under the ESA, however, there must be some evidence to show that the electronic text actually does reflect the employee's agreement. Simply not responding to an e-mail from an employer that says, for example, "If you don't respond, you will be considered to have agreed to..." does not constitute a valid agreement for the purposes of the ESA.

2. The agreement must indicate the employee's agreement to have his or her hours of work averaged over periods of a specified number of weeks.

Generally, employees are entitled to overtime pay at 1½ times their regular rate of pay after 44 hours of work in work week. Employees may agree to have their hours of work averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement to overtime pay, if any.

It is not sufficient for an agreement to note, "The employee agrees to have his or her hours of work averaged." The agreement must indicate the specific number of weeks that the employee is agreeing to have his hours of work averaged over. The agreement must also indicate that the employee's hours of work are being averaged for the purposes of determining entitlement to overtime pay.

3. The employer may wish to refer explicitly in the agreement to the fact that overtime pay under the ESA is generally determined on a weekly basis, and is payable for all hours in excess of 44 in a work week to assist in demonstrating informed consent.

An employee's consent to average hours of work must be informed. An employee must be aware that he or she is giving up the right to have his or her overtime pay entitlement determined on a weekly basis for hours of work in excess of 44.

4. The agreement must provide an expiry date.*

For an overtime averaging agreement to be valid, the agreement must contain an expiry date.

*If the agreement involves an employee who is not represented by a union, the expiry date of the agreement cannot be more than two years after the day the agreement takes effect.

- 5. Ideally, the agreement would inform the employee that it cannot be cancelled before the agreement expires unless BOTH the employer and the employee agree to cancel.**

Neither the employee nor the employer can cancel an agreement to average hours of work unilaterally; both parties must consent.

- 6. Ideally, the agreement would indicate any additional terms or conditions negotiated by the employer and employee relevant to averaging hours of work for the purposes of determining entitlement to overtime pay.**

In exchange for agreeing to average hours of work, an employer and employee may negotiate other terms. Some parties may agree to abide by a particular work schedule. For example, employees may agree to a work schedule that provides for a greater number of days off work in exchange for agreeing to have their hours of work averaged over a period of two weeks for the purposes of determining their entitlement to overtime pay. Ideally, terms such as these should be included in the agreement so that the employer and employee can easily determine what it is they are agreeing to.

- 7. Ideally, the agreement would state when it would come into effect.**
- 8. The agreement must include the names of the parties to the agreement (i.e. the employer's name and the employee's name).**
- 9. There must be some clear indication in the agreement that the employer and employee have in fact agreed.**

Typically the agreement of the employee and the employer is indicated by having both parties sign the agreement.

Other items to keep in mind:

- Employees must have had a sufficient amount of time to consider the agreement before agreeing to enter into it. What is sufficient will vary depending on the circumstances and the type of agreement.
- The agreement must be sufficiently specific so that an independent, objective third party would be able to determine what was being agreed to simply by reading the agreement.
- A union may enter into an agreement to average hours of work on behalf of the employees they represent.

